STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

TERRANCE MALLETT,

Defendant-Appellee.

UNPUBLISHED
August 27, 2002

No. 234406
Wayne Circuit Court
LC No. 99-007021

Before: Whitbeck, C.J., and O'Connell and Meter, JJ.

PER CURIAM.

A jury convicted defendant of possession with intent to deliver more than 50 but less than 225 grams of heroin, MCL 333.7401(2)(a)(iii), possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv), and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced him as a third habitual offender, MCL 769.11, to ten to twenty years' imprisonment for the heroin conviction, to be served concurrently with lifetime probation for the cocaine conviction and consecutively to two years' imprisonment for the felony-firearm conviction. Defendant brought a motion for a new trial. After holding a *Ginther*[1] hearing, the trial court granted the motion, concluding that defendant's trial attorney had rendered ineffective assistance of counsel. The prosecutor appeals by leave granted, and we reverse.

A trial court may grant a motion for a new trial "on the basis of any ground that would support reversal on appeal or because it believes that the verdict resulted in a miscarriage of justice." *People v Jones*, 236 Mich App 396, 404; 600 NW2d 652 (1999); see also MCR 6.431(B). We review a trial court's decision to grant a new trial for an abuse of discretion. *Jones*, *supra* at 404. To determine whether the trial court abused its discretion, this Court must examine the reasons given by the court for granting the motion. *Id*. "This Court will find an abuse of discretion if the reasons given by the trial court do not provide a legally recognized basis for relief." *Id*.

The prosecutor argues that the trial court erred in concluding that defendant's trial attorney rendered ineffective assistance of counsel. We agree. To establish ineffective

[1] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

assistance of counsel, a defendant must show (1) that the performance of counsel "was below an objective standard of reasonableness under prevailing professional norms" and (2) a reasonable probability that, in the absence of counsel's error or errors, the outcome of the proceedings would have differed. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). This Court presumes effective assistance of counsel, and a defendant bears a heavy burden to overcome this presumption. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001).

The trial court determined that trial counsel failed to raise a potentially meritorious challenge to the search warrant that led to the discovery of the drugs and the firearm. It concluded that the search warrant affidavit potentially contained material misstatements made in reckless disregard of the truth and that counsel should have known this because of the unnatural similarity between this affidavit and affidavits from two separate cases.[2] We disagree with the implication that counsel was required under an objective standard of reasonableness to research additional search warrant affidavits made by the affiant in question. Moreover, defendant did not make a showing that the affiant did in fact insert false material into the affidavit in this case and that the false material was necessary to the finding of probable cause. Accordingly, defendant did not establish ineffective assistance of counsel with respect to the search warrant issue. See *People v Ulman*, 244 Mich App 500, 510; 625 NW2d 429 (2001); see also *Garza*, *supra* at 255 (defendant bears the burden of establishing ineffective assistance of counsel).

Next, the trial court determined that trial counsel failed to prepare for and investigate adequately the case and failed to present certain corroborating evidence. However, "[d]ecisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy." *Garza*, *supra* at 255. "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess trial counsel's competence with the benefit of hindsight." *Id*. "When making a claim of defense counsel's unpreparedness, a defendant is required to show prejudice resulting from this alleged lack of preparation." *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990). Further, the failure to interview witnesses does not in itself establish inadequate preparation, because it must be shown that the failure to interview "resulted in counsel's ignorance of valuable evidence that would have substantially benefited the defendant." *Id*. at 642.

The trial court's lengthy litany of counsel's alleged errors with regard to the investigation and preparation of the case fails to support a finding of ineffective assistance. First, as noted earlier, counsel had no obligation under prevailing professional norms to research other affidavits signed by the affiant in question here. Second, assuming that witnesses Delbert Fort

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[2] We note that while there were similarities among the affidavits, there were also significant differences. For example, the affidavit used in this case referred to a different source of information than that referred to in the other two affidavits. Further, the affidavit in this case contained an allegation that defendant used a Corvette to transport narcotics, an allegation not made in either of the other two affidavits. We also note that certain facts contained in the affidavit in this case were corroborated through the trial testimony of Officer Conrad Gaines, who assisted in the surveillance of the premises.

and Derrick Carpenay[3] could have testified in this matter, defendant made no showing that their testimony would have substantially benefited him. *Id.* Third, it is unlikely that a "missing witness" jury instruction with regard to Officers Fort and Carpenay or an objection to certain assertions made by the prosecutor about these witnesses would have affected the outcome of the trial, because defendant did not deny the existence of the drugs found in the house but instead asserted that they were not his drugs.[4] Fourth, there was no substantial likelihood that an objection to the prosecutor's comments regarding the truthfulness of the testifying officers would have affected the outcome of the case because (1) as discussed *infra*, certain of the prosecutor's comments were proper and another was harmless and (2) the jury was instructed that the lawyers' comments were not evidence in the trial and that it should judge the officers' testimony in accordance with the same standards used to evaluate the testimony of other witnesses. Fifth, the alleged failure to prepare adequately for questioning Officer John Hall was not outcome-determinative because (1) it is clear from a reading of the transcripts that trial counsel extensively cross-examined this witness, and (2) Hall's testimony related to finding drugs and drug paraphernalia in the residence, and defendant did not deny the existence of the drugs but instead alleged that they did not belong to him.[5] Sixth, contrary to the trial court's suggestion, trial counsel did attempt to corroborate defendant's testimony regarding the existence of dogs at the residence by questioning Officer Gaines regarding the presence of dogs, and there is no indication that photographic evidence of the dogs was available.[6] Seventh, trial counsel's failure to call Kimberly Burrell as a witness was not erroneous under prevailing professional norms because defendant did not suggest to counsel that Burrell had any useful information. Moreover, Burrell's testimony would likely have been cumulative, in large part, to Officer Gaines', because at the *Ginther* hearing Burrell testified that she only heard the dogs but did not see them at the residence in question, and Gaines implied that a dog may have been barking somewhere around the house. Eighth, trial counsel's failure to contact the alleged "true homeowner" was not an error likely to have affected the outcome of the case because it is highly unlikely such a person would testify regarding the ownership of the residence in question. Finally, we conclude that

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[3] Officers Delbert Fort and Derrick Carpenay apparently participated in the execution of the search warrant in this case, but they did not testify at trial. The prosecutor indicated during voir dire that the two officers had been indicted for stealing money from certain houses while executing search warrants. The officers were also suspected of stealing drugs and other items, in addition to money, from houses being searched.

[4] Defendant alleges on appeal that "[t]he fact that [Fort and Carpenay] may have stolen drugs meant that they had a cache of drugs which were available to plant in homes such as the one in which the appellee was found." We note, however, that defendant made no showing at the *Ginther* hearing that he could have credibly supported at trial a theory that the police planted the evidence in this case. See *Garza*, *supra* at 255 (a defendant bears the burden of establishing ineffective assistance of counsel).

[5] We again note that defendant made no showing at the *Ginther* hearing that he could have credibly supported at trial a theory that the police planted the evidence in this case.

[6] At trial, defendant alleged that he was at the residence in question because he was caring for dogs located at the residence. Officer Gaines testified that he could not recall a dog barking in the backyard of the residence but stated that "it's often we get a house it would be a dog next door barking. You can't tell if it's in the yard you are going to or not, but I didn't do the backyard."

although the prosecutor should not have implied that defendant had a duty to turn drugs belonging to someone else over to the police, the failure by counsel to object to this brief comment once again did not likely affect the outcome of the case.

The trial court additionally determined that trial counsel improperly failed to move to exclude evidence of defendant's prior conviction and failed to prepare defendant to testify properly. However, the evidence of defendant's prior conviction was indeed inadmissible under the court rules, and counsel should not be faulted for presuming that the prosecutor would follow those rules. Moreover, defense counsel testified at the *Ginther* hearing that he told defendant that his prior conviction could not be used against him unless defendant put it in issue in his own testimony. Therefore, defense counsel reasonably prepared and informed defendant about the use of his prior conviction. Finally, when defendant testified about a prior drug arrest after a question by the prosecutor, as discussed in greater detail *infra,* defense counsel reasonably refrained from objecting in order to avoid drawing additional attention to the matter. Moreover, we cannot conclude that defendant's brief response about a prior drug arrest or the prosecutor's brief comment in closing arguments that "he even told you he had been in that situation [a police raid] before" likely affected the outcome of the case, given the additional evidence introduced against defendant at trial.

The trial court additionally determined that defense counsel unreasonably failed to challenge biased jurors or jurors with special knowledge during voir dire. However, in *People v Robinson,* 154 Mich App 92, 95; 397 NW2d 229 (1986), this Court stated that the question of which jurors to accept or strike is strategic and within the exclusive province of the trial attorney. The Court stated:

> Our research has found no case in Michigan where defense counsel's failure to challenge a juror or jurors has been held to be ineffective assistance of counsel. We cannot imagine a case where a court would so hold, and we do not so hold in this case. [*Id*.]

We agree that ineffective assistance cannot be predicated on the failure to challenge jurors in this case, especially because counsel testified at the *Ginther* hearing that defendant agreed with the decision to retain the jurors in question. Moreover, we cannot conclude that the failure to challenge the jurors likely affected the outcome of the case because the jurors indicated that they could set aside their biases and be fair to both sides in this case.

Finally, the trial court determined that defense counsel improperly failed to object to the introduction of drug profile testimony by Officer Gaines. However, even assuming that Gaines' testimony that defendant's actions were consistent with drug trafficking was excluded, Gaines' observations in general of defendant would have been admissible, and these observations, combined with the other evidence introduced at trial, led on their own to an implication of drug trafficking. Accordingly, any potential error with regard to "drug profile" evidence did not likely affect the outcome of the case.

The trial court's cited instances of alleged ineffective assistance of counsel simply do not "provide a legally recognized basis for relief." *Jones, supra* at 404. We thus conclude that the trial court abused its discretion in granting defendant a new trial. *Id.*

Although the trial court indicated in its last opinion that it granted defendant a new trial solely based on ineffective assistance of counsel, it discussed at considerable length in an earlier opinion several instances of alleged prosecutorial misconduct. Moreover, the court in its last opinion stated that "numerous and substantial errors taken as a whole denied the defendant a fair trial," and the prosecutor devotes considerable time on appeal discussing the issue of prosecutorial misconduct. Accordingly, we will briefly address the issue of potential prosecutorial misconduct. We conclude that no misconduct requiring reversal occurred.

We review issues of prosecutorial misconduct case by case to determine if the defendant was denied a fair trial. *People v Rice (On Remand)*, 235 Mich App 429, 434; 597 NW2d 843 (1999). "Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial." *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). Here, defendant failed to object in a timely and specific manner to the challenged statements; therefore, we review the allegations of prosecutorial misconduct for plain error. *People v Schultz*, 246 Mich App 695, 709; 635 NW2d 491 (2001); see also *People v Carines*, 460 Mich 750, 766-767; 597 NW2d 130 (1999). In order to establish relief, defendant must demonstrate the existence of a clear or obvious error that likely affected the outcome of the trial. *Schultz*, *supra* at 709.

The trial court first determined that the prosecutor attempted to elicit improper information from defendant. Defendant testified that he laid on the floor when the police entered the house during their execution of the search warrant. The prosecutor asked defendant, on cross-examination, "Well you knew [what to do] because you had faced that kind of situation before hadn't you?" Defendant responded, "Right. I have been arrested like 10 years ago before for trying to be a drug dealer so." We conclude that defendant provided an unresponsive, voluntary answer indicating that he was previously arrested for drug dealing, when the prosecutor did not specifically ask him if he had been previously arrested.[7] Moreover, as noted earlier, we cannot conclude that defendant's brief response or the prosecutor's brief comment in closing arguments that "he even told you he had been in that situation before" likely affected the outcome of the case, given the additional evidence introduced against defendant at trial.

The trial court also determined that the prosecutor misstated the law and misstated facts regarding the absence of testimony by Officers Fort and Carpenay. However, even assuming, arguendo, that the prosecutor erred in discussing Fort and Carpenay, the error did not likely affect the outcome of the case. Indeed, defendant did not allege that the officers stole, or even planted, any evidence during the raid in the instant case.[8] Defendant did not dispute the existence of drugs in the house in question but instead alleged that the drugs did not belong to him. Under these circumstances, the credibility of Fort and Carpenay was a collateral issue at trial, and the prosecutor's statements with regard to these officers were likewise collateral.

Finally, the trial court determined that the prosecutor improperly vouched for the veracity of the police witnesses. We conclude that the prosecutor, in arguing that the police officers were

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[7] We reiterate that at the *Ginther* hearing, defense counsel testified that he told defendant that the conviction could not be used against him unless defendant raised the issue.

[8] See footnote 5, *supra*.

not lying, was simply arguing that a commonsense view of the evidence led to the conclusion that the officers' testimony was truthful. The prosecutor did not convey special knowledge that the officers testified truthfully. See *People v Ramsdell,* 230 Mich App 386, 404; 585 NW2d 1 (1998). Moreover, while the prosecutor should not have stated that the officers "cleaned house" with regard to Officers Fort and Carpenay,[9] we conclude that this brief comment did not likely affect the outcome of the trial. Further, the trial court instructed the jury that the lawyers' comments and arguments were not evidence in the trial. Under these circumstances, no prosecutorial misconduct requiring reversal existed.[10]

Reversed and remanded for reinstatement of defendant's convictions. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Peter D. O'Connell
/s/ Patrick M. Meter

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[9] As noted by the trial court, it was the federal prosecutor who "cleaned house" with respect to Officers Fort and Carpenay.

[10] We note that defendant cites on appeal several instances of alleged prosecutorial misconduct and ineffective assistance that were not mentioned by the trial court. We have reviewed defendant's claims and find them to be without merit.